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No. 00-722

In the

Supreme Court of the United States

OCIE MILLS and CAREY MILLS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the decision of the Eleventh Circuit Court of Appeals conflicts with the decision of this Court in *United States v. Morgan*?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise.

This case arises from an increasing tendency by government agencies to invoke criminal statutes to coerce, compel, or redress conduct arising from activities which would have in former times been considered, at most, civil wrongs. Indeed, the conduct which provided the basis for what is all but conceded to have been a misguided criminal prosecution in this case would not have been of interest to any agency--federal or state--a scant few years ago. Yet, as will be shown below, government agencies recently have not only exhibited an insatiable interest in enlarging their regulatory regimes, but have also reinforced that expanded authority with the veiled threat of criminal liability.

As if to underscore these proclivities, federal agencies today increasingly utilize another device to increase their sway upon the body politic, namely adopting regulatory interpretations that go well beyond the plain meaning and intent of the statutory authority conferred on them by Congress. The confluence of this penchant for expansion, aggressive interpretation, and the deployment of criminal process where it has heretofore not been envisioned creates a significant potential for citizen harm without any concomitant social or community good, as the facts of this case demonstrate. In a case

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

in which the results defy common sense and centuries of English and American legal tradition, two citizens of this country not only suffer convictions of crimes of which they are in all likelihood not guilty, but also find themselves time-barred, through no fault of their own, from contesting error of the most fundamental character that infected the trial that resulted in those convictions. Although exhibiting considerable discomfort with the result, the Eleventh Circuit Court of Appeals upheld these convictions on the basis of what it considered to be binding precedent of this Court.

PLF has participated in numerous cases involving the interpretation of federal laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Pacific Legal Foundation attorneys have also represented property owners like the petitioners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g. Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 2047, 2000 LEXIS 6596 (Oct. 10, 2000), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In addition, Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). PLF attorneys have also previously appeared in this case as cocounsel on issues

which have been previously resolved, *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

PLF submits that because of its considerable experience protecting civil rights including property rights before this Court, its participation here will add a valuable and unique perspective that will assist this Court's consideration of this case.

STATEMENT OF THE CASE

This case arises out of the 1989 felony convictions of a father and son, Ocie and Carey Mills, on five counts of "discharging pollutants into the navigable waters of the United States" in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and one count of unlawfully excavating a canal in the navigable waters of the United States, in violation of the Rivers and Harbors Act, 33 U.S.C. § 403, *et seq.* Petitioner's Appendix B at 11. The Millses' offense was the dumping of clean sand on a plot of subdivided dry land owned by them that the United States Corps of Engineers deemed to be a "wetland." *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993). For at least the last 22 years, since the Millses' property was subdivided, the land has not been wet beyond that which might briefly obtain after a Florida rainstorm--"it had no standing water on it, nor did it appear to be a marsh, swamp, or bog." *Id.*[2] The Millses bought the property in 1986. *Id.* at 1549.

This case has a lengthy and tortured procedural history. *See* Petitioners' Statement of the Case. However, during the

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[2] The property was described by the trial judge, who in 1991 viewed the property as part of a proceeding on a petition to enforce the conditions of a supervised release because of alleged failure of the petitioners to comply with a site restoration plan as being "mostly wooded, with large pine, oak, gum, bay, and magnolia trees, as well as lots of smaller trees and shrubs." *Id.*

course of one of the proceedings, it became apparent that at the time of the alleged offenses by the Millses, the subject land was probably not a "wetland" within the meaning of the Clean Water Act. *Id.* at 1548. In fact, any characteristics of the land under which it could have been so classified had been effaced long before the Clean Water Act Regulations on which the Millses were convicted became effective. *Id.*

The Milles were so incredulous that they could be prosecuted for placing clean fill on their own dry land, that they represented themselves without the benefit of counsel in their 1989 jury trial. *Mills v. United States*, 36 F.3d at 1056 n.6. Nevertheless, they were convicted, sentenced to 21 months in jail, 1 year of supervised release, and fined $5,000, as well as being required to comply with a site restoration plan.[3]

On April 11, 1996, Petitioners filed a petition for writ of error *coram nobis* contending that they were entitled to a new trial based upon juror misconduct. Attached as an exhibit to the petition is an affidavit of Quentin Wise, a member of the jury that convicted the defendants. The affidavit recites that Mr. Wise contacted Ocie Mills by telephone on March 3, 1996, after watching a television program where Mr. Mills was describing his grievances. Mr. Wise stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses' that had not been introduced into evidence at trial. According to the affidavit, the source of the information was Mr. Smith's son, who worked for the State of Florida Water Management. The affidavit states that the jury foreman had repeatedly told the jury that Ocie Mills had prior cases, that Mr. Mills had threatened environmental regulators

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[3] The knowing discharge of pollutants, without a permit, into the "navigable waters of the United States" is punishable by a fine of between $5,000 and $50,000, and imprisonment for not more than three years. 33 U.S.C. § 1319(c)(2). Sand is a "pollutant" under the Clean Water Act. 33 U.S.C. § 1362(6).

on his property with a gun, and that if Mr. Mills were found guilty, he would not be sentenced to a prison term and would only have to remove soil from his property. Mr. Wise also stated that he felt intimidated by Mr. Smith. Petitioner's Appendix B at 12; *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000).

The government in this case recognizes that no other remedy is available to the Millses on the facts stated and that the Millses have presented sound reasons for failing to seek relief earlier. *Id* at 1204 n.4. Nevertheless, the government contends that a writ of error *coram nobis* is unavailable to the Millses on the basis of this Court's reasoning in *United States v. Mayer*, 235 U.S. 55, 69 (1914), that "[i]n cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial . . . ."[4] Thus, the government contends that the Millses' application for a writ is time-barred since the time to file a motion for a new trial has passed. The Millses contend, to the contrary, that the jury misconduct alleged is of such fundamental character that the writ should issue.

SUMMARY OF THE ARGUMENT

Certiorari should be granted in this case because the decision of the Eleventh Circuit Court of Appeals below, *United States v. Mills*, 221 F.3d 1201, directly and irreconcilably conflicts with this Court's decision in *United*

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[4] Rule 33, Fed. R. Crim. P. provides that a court may grant a new trial based upon newly discovered evidence, but only if made within three years of the verdict. At the time the Millses were convicted, the time limit was two years. Rule 33, Fed. R. Crim. P. Advisory Committee Notes, 1998 Amendments. These deadlines had both passed before the Millses learned of the facts which form the basis for their writ of error *coram nobis*.

States v. Morgan, 346 U.S. 502 (1954). Certiorari is especially warranted here by the additional fact that the convictions at issue are based upon constitutionally questionable extensions of criminal liability under the Clean Water Act that, together with similar extensions in other environmental statutes, have increasingly resulted in the criminalization of conduct of citizens of the United States which formerly would have been treated as, at most, civil wrongs.

Ocie and Carey Mills were convicted in 1989 of five felony counts of discharging pollutants into the navigable waters of the United States in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq*. In 1993, factual and legal investigation resulting from a requirement that they restore the property demonstrated that the Millses were in all likelihood never guilty of the crimes with which they were charged. In 1996, the Mills additionally discovered that their fundamental right to a trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution had been violated. The Millses did not know or have reason to know of the juror misconduct prior to 1996. Despite the existence of this error, the Eleventh Circuit Court of Appeals declined to allow the issuance of a writ of error *coram nobis,* the only remedy available to them some ten years after their erroneous convictions.

A writ of error *coram nobis* is an extraordinary remedy of last resort which emanates from the all writs section of the Judicial Code, 28 U.S.C. § 1651(a). The writ may issue only under compelling circumstances involving error of the most fundamental character, which renders the proceeding itself irregular and invalid. This Court should reverse the decision of the Eleventh Circuit Court of Appeals and permit the granting of the writ on the compelling circumstances of this case.

ARGUMENT

I

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *UNITED STATES v. MORGAN*

A writ of error *coram nobis* is an extraordinary remedy of last resort. While no one doubts the availability of the writ in English common law, Archibold (7th ed., Chitty, 1840 350, 389), it has been questioned whether the writ continued to exist in modern criminal jurisprudence in the United States. In 1954, this Court squarely addressed and settled the issue, holding that a writ of error *coram nobis* was an available post-judgment ground for relief, but only under very limited circumstances. *United States v. Morgan*, 346 U.S. 502.

The power to issue the writ emanates from the all-writs section of the Judicial Code, 28 U.S.C. § 1651(a). *Id.* at 506. It has been said that the writ may issue only under "[s]uch compelling circumstances . . . involv[ing] a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Moody v. United States*, 874 F.2d 1575, 1576 (11th Cir. 1989) (citing *United States v. Mayer*, 235 U.S. at 69). In *Mayer*, the United States Supreme Court was asked to grant a writ of error *coram nobis* to consider allegations that a criminal conviction was improvidently obtained through prosecutorial misconduct and undisclosed juror bias. *Mayer* 235 U.S. at 58. While expressing no opinion on whether a writ of error *coram nobis* was available in modern American jurisprudence, the Court reasoned that even if it was, it could only be invoked to remedy error of the most fundamental character. The Court stated:

> [E]ven if it be assumed that in the case of errors in certain matters of fact, the district courts may

> exercise in criminal cases--as an incident to their powers expressly granted--a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis*, as to which we express no opinion, that authority would not reach the present case. *This jurisdiction was of limited scope; the power of the Court thus to vacate its judgments for errors of fact existed*, as already stated, *in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.*

Mayer, 235 U.S. at 69 (emphasis added, citation omitted).

One might think that violation of one's Sixth Amendment right to "enjoy the right to a trial . . . by an impartial jury" would fall squarely into that category of cases requiring the issuance of a writ. This Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). However, in *Mayer*, Chief Justice Hughes on behalf of the Court stated in arguably overly sweeping terms that a writ would be unavailable for either "misbehavior or partiality of jurors." *Mayer*, 235 U.S. at 69. The Court stated:

> In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by motion for a new trial.

Mayer, 235 U.S. at 69.

Although the district court judge granted the writ, apparently placing little weight on the sweeping language in *Mayer*, the Eleventh Circuit Court of Appeals reversed, finding

itself compelled to follow *Mayer*. However, even they were uncomfortable with the result they felt bound to reach:

> We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree.

United States v. Mills, 221 F.3d at 1205.

Although juror misbehavior whether by concealment of bias during voir dire or misconduct in the jury room through introduction of extra-judicial statements or evidence not received during the course of trial are serious offenses, PLF submits that *Mayer* is distinguishable on its facts. The issue in that case appears to have been one of extant juror bias that was either not discovered or not divulged during voir dire, but which theoretically could have been discovered. In the instant case, no amount of effort by the Millses could have revealed the error of which they complain.[5]

On the other hand, the decision of the Eleventh Circuit Court of Appeals below directly and irreconcilably conflicts with *United States v. Morgan*, 346 U.S. 502. In *Morgan*, this Court affirmed the issuance of a writ of error *coram nobis* where it appeared that the respondent Morgan had been convicted in violation of his constitutional right to be provided counsel. *Morgan*, 346 U.S. at 503. Ocie and Carey Millses' Sixth Amendment right to jury trial is no less important than

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[5] In fact, Fla. Bar Code Prof. Resp. D.R. 4-3.5(d) prohibits a lawyer in Florida from communicating with jurors after a verdict unless the lawyer has grounds to believe that the verdict may be subject to legal challenge based upon juror misconduct. Thus, counsel for the Millses was legally prohibited from initiating an investigation of the jury room misconduct which ultimately came to the attention of Ocie Mills. *See also Roland v. State*, 584 So. 2d 68 (Fla. 1st DCA 1991).

Morgan's Sixth Amendment right to counsel which was at issue in *Morgan.* Just as Morgan was entitled to a writ to protect that right, so also are Ocie and Carey Mills entitled to a writ here to vindicate their Sixth Amendment right to trial by an impartial jury.

II

WRIT OF CORAM NOBIS IS PARTICULARLY JUSTIFIED BECAUSE THE MILLSES' CONVICTIONS WERE NOT ONLY TAINTED BY JUROR MISCONDUCT, BUT WERE BASED UPON INNOCENT CONDUCT THAT TRADITIONALLY HAS BEEN CONSIDERED PERFECTLY LEGAL

The importance of this case should be apparent. This case arises because a father and son spent 21 months in prison, a year of supervised release, and paid significant fines for engaging in conduct that is now all but conceded to have been lawful conduct by them on their own property. *United States v. Mills*, 817 F. Supp. at 1548. Such a set of facts, where parties are first convicted of violating the law on the basis of conduct that was innocent and probably legal, only later to find that their convictions were also tainted by blatant jury misconduct, should cause outrage in anyone concerned about personal liberty in this country. But beyond outrage, the facts of this case fashion an additional, unique prism which supports the granting of certiorari in this case.

As recognized by the district judge at one point during the course of this saga, "[t]his case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act." *Id.* The Millses were incarcerated for dumping clean sand on land owned by them that was not "wet" in any ordinary sense of the word. At the time of the alleged offense, the land was most probably not even a "wetland" within the Corps' perversion of the term contained in the

regulatory hydra of the Clean Water Act. In short, the Millses were convicted based upon a counter-intuitive application of a regulatory definition promulgated not by Congress, but rather by the United States Corps of Engineers during the course of a rulemaking process ordinarily employed for regulatory rather than criminal purposes.[6]

Since 1970, the federal government has dramatically increased its regulatory and enforcement activity. Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. Chi. Legal F. 607 (1997). Up until the 1980's, however, these statutes were commonly enforced through civil enforcement procedures and the penalties imposed were rather mild. *Id.* at 608. However,

> [i]n the 1980s and early 1990s Congress significantly enhanced criminal provisions in the nation's environmental laws. It introduced new, more serious crimes and stiffened penalties across the board. Now, most violations are felonies with accordingly significant fines and prison sentences. Congress also enacted a pair of laws that bestowed greater resources and powers on the EPA to enforce environmental laws criminally. Furthermore, the Federal Sentencing Guidelines, enacted in 1987, contain specific provisions for environmental crimes and make prison sentences considerably more likely.

Id. at 608-09 (footnotes omitted).

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[6] This raises additional constitutional questions. *See United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989) (In order to be valid, a penal law must provide a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."); *Liparota v. United States*, 471 U.S. 419, 424 (1985) (The penal laws of the United States are creatures of Congress and required to be so under constitutional separation of powers.).

The trend toward criminal enforcement of environmental laws has serious potential consequences for ordinary citizens who merely wish to know and abide by the law, because environmental laws are notoriously ambiguous. For example, the Clean Water Act, which the Millses stand convicted of having violated, prohibits the discharge of fill or dredged material into **navigable waters** (33 U.S.C. § 1344) without the issuance of a permit pursuant to 33 U.S.C. § 404. Section 1344 also refers to these navigable waters as **waters of the United States**. Thus, an ordinary citizen wishing to exercise care might reasonably ask whether all wetlands wherever located are subject to the prohibition?[7] If so, what constitutes a wetland? Does a dry lot qualify that has vegetation sometimes found in wetland areas, but which has no standing water, or hydric soils?[8] And for that matter, since section 404 only applies if a pollutant is added to the wetlands from a "point source,"[9] is a

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[7] In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court ruled that wetlands adjacent to navigable waters qualify, but did not address isolated wetlands

[8] The Corps of Engineers has defined by regulation wetlands to mean "[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(8)(b) (1998). The Corps of Engineers has also drafted an entire technical manual to help scientists define a jurisdictional wetland. *See 1987 Wetland Delineation Manual*, Wetlands Research Program Technical Report Y-87-1.

[9] The Act defines "point source" as

> any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling

(continued...)

human being, such as Ocie Mills, a point source when he is spreading sand on his lot? Apparently, these ambiguities had no dissuading impact on the government's decision to prosecute the Millses.[10] However, ambiguities such as these leave "significant discretion to courts, prosecutors, and bureaucrats to resolve textual uncertainty [in the laws]" well beyond that existing in the usual criminal prosecution. Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. Chi. Legal F. at 608. Discretion of such breadth provides the leeway for the government to define an offense after the conduct has occurred, an idea which should be as repulsive to a person interested in ordered liberty as the introduction of extraneous evidence into a jury room.

Despite these ambiguities, the harsh and unyielding hand of criminal prosecution continues. EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were

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[9] (...continued)

> stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

[10] This Court has frequently admonished that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). *See also United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison. Kevin A. Gaynor, Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l. Envtl. L. & Pol'y 39, 40 (Winter, 1999). At the same time amendments to the statutes have expanded the scope of criminal liability by introducing lower or no intent crimes, such as the recent criminalization of merely negligent conduct under the Clean Air and Clean Water Acts. 42 U.S.C. § 7413(c)(4); 33 U.S.C. § 1319(c)(1). Some courts have also provided aid and comfort to the expansion of criminal liability by interpreting violations of environmental statutes to be "public welfare offenses." In such cases, the government is allowed to do away with the presumption of innocence and apply strict criminal liability by not having to establish any mens rea. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1283-84 (9th Cir. 1994).

The expansion of criminal liability under the federal environmental laws coupled with the lowering of the bar for convictions and rising penalties creates complicated issues of culpability for those accused of running afoul of environmental laws. As the grounds for criminal liability for violations of complex and ambiguous laws expand, ordinary citizens run an increasing risk of criminal conviction for wholly innocent conduct. The imposition of criminal penalties under these circumstances, especially where there is no criminal intent, is incompatible with a free society. *See Morissette v. United States,* 342 U.S. 246, 252 (1952) ("wrongdoing must be conscious to be criminal").

The Millses unfortunately fell into this very trap. They were subjected to criminal penalties for placing clean sand on their dry land. The United States Army Corps of Engineers interpreted this action to violate the Clean Water Act's less than obvious provisions prohibiting the discharge of fill into navigable waters without a permit. They were not even afforded a fair trial free of jury misconduct. Their

circumstances rise to the level of "an error of law of the most fundamental character." The Court should grant the writ of certiorari, address this important issue, and reverse the lower court.

CONCLUSION

Ocie and Carey Millses stand convicted of crimes in a trial infected with fundamental error that they did not and could not have reasonably discovered before the time had passed for them to seek relief under the normally employed statutes and procedures. Moreover, their crimes were based upon the counter-intuitive application of a constitutionally questionable, complex environmental regulatory scheme promulgated not by Congress, but rather by a federal agency. This scheme puts ordinary citizens at risk for criminal prosecution based upon innocent conduct that has traditionally been considered perfectly legal and noncriminal. PLF submits that this case presents compelling circumstances for the issuance of a writ of error *coram nobis* and that the lower court's failure to approve a grant of such a writ conflicts with the settled law of this Court.

DATED: December, 2000.

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